

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In re:

JEFFREY DALE PHILLIPS and
CHRISTINA LEE PHILLIPS

CASE NO.: 19-30566-KKS
CHAPTER: 7

Debtors.

KEN ARNOLD

ADV. NO.: 19-03009-KKS

Plaintiff,

v.

JEFFREY DALE PHILLIPS and
CHRISTINA LEE PHILLIPS

Defendants.

ORDER DENYING PLAINTIFF'S *MOTION FOR SUMMARY*
JUDGMENT ON ISSUE OF NON-DISCHARGEABILITY (DOC. 32)

This case is before the Court on Plaintiff's *Motion for Summary Judgment on Issue of Non-Dischargeability* ("Summary Judgment Motion," Doc. 32). Having considered the record and applicable law, the Summary Judgment Motion is due to be denied for the reasons set forth below.

PROCEDURAL HISTORY

Plaintiff filed his initial Complaint, entitled *Complaint for Nondischargeability of Debt*, July 16, 2019 and an amended complaint (“Complaint”) July 17, 2019.¹ Despite the title, the Complaint contains three (3) counts for relief: Counts I and III seek denial of both Defendants’ discharges under 11 U.S.C. § 727(a)(1) and (a)(2); Count II seeks a determination that debt owed by Defendant, Jeffrey Dale Phillips (“Mr. Phillips”), to Plaintiff is nondischargeable under § 523(a)(6).² Defendants timely filed an answer.³ The Court entered an order scheduling pretrial and trial and setting deadlines for discovery; fact discovery was to be completed by February 16, 2020.⁴

Before the discovery deadline expired, Defendants’ attorney moved to withdraw, citing irreconcilable differences.⁵ The Court granted that motion, so since February 26, 2020, Defendants have been self-represented.⁶ At one point Defendants’ counsel had unsuccessfully

¹ Docs. 1; 3.

² Doc. 3, pp. 5-7.

³ Doc. 7.

⁴ Doc. 12.

⁵ Doc. 14.

⁶ Doc. 20.

attempted to obtain an agreement from Plaintiff to delay discovery.⁷ In April of 2020, Plaintiff filed a motion to compel discovery and for sanctions on the grounds that Defendants had missed their scheduled depositions and failed to respond to written discovery.⁸ On June 2, 2020, the Court entered an order requiring Defendants to respond to discovery and appear for their depositions.⁹

BACKGROUND

Defendants filed their Chapter 7 bankruptcy petition May 15, 2019.¹⁰ During and prior to the bankruptcy, Mr. Phillips operated a business called Affordable Marine Service (“Affordable Marine”) as a sole proprietorship.¹¹ Plaintiff holds a judgment against “Jeffrey Phillips d/b/a Affordable Marine Service” (“State Court Judgment”).¹² The State Court Judgment awarded Plaintiff \$122,922.50 and ordered

⁷ Doc. 27, pp. 2-3.

⁸ *Motion to Compel Debtors’ Discovery Responses and Depositions and for Sanctions*, Doc. 27.

⁹ *Order Granting, in Part, Plaintiff, Ken Arnold’s Motion to Compel Debtors’ Discovery Responses and Depositions*, Doc. 37. The Court denied Plaintiff’s request for sanctions as premature. *Id.* The Docket reflects that Plaintiff’s counsel served this Order on Defendants by mail on June 9, 2020. Doc. 40. No additional notices of taking deposition appear of record.

¹⁰ *In re Phillips*, Case No.:19-30566, Doc. 1 (Bankr. N.D. Fla).

¹¹ *Id.* at Docs. 1, p 33; 32, p. 13.

¹² *Final Judgment*, Circuit Court in and for Escambia county, Florida, Case No. 2016 CA 001646. Doc. 32-1

Mr. Phillips to make a certain boat, motors and trailer (collectively, the “Vessel”) available for pickup by Plaintiff.¹³

SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56(a), made applicable by Fed. R. Bankr. P. 7056, summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁴ A material fact is one that “might affect the outcome of the suit under governing law.”¹⁵ The moving party has the burden to demonstrate the absence of a genuine issue of material fact.¹⁶ “[T]he evidence and inferences drawn from the evidence are viewed in the light most favorable to the nonmoving party, and all reasonable doubts are resolved in his favor.”¹⁷

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¹³ The “Vessel” is described in the State Court Judgment as “1993 Hydrotech with two Honda 225 horsepower motors, and trailer.” *Id.* at p. 2.

¹⁴ Fed. R. Civ. P. 56(a), made applicable by Fed. R. Bankr. P. 7056.

¹⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁶ *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970).

¹⁷ *WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988) (citing *Mercantile Bank & Tr. Co. v. Fid. & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985)).

DISCUSSION

Plaintiff is not entitled to Summary judgment on Count I, denial of Discharge under § 727(a)(1), because Affordable Marine is a sole proprietorship

Plaintiff seeks denial of Defendants' discharges under § 727(a)(1) based on his assertion that Affordable Marine is not an "individual" so under § 727(a)(1) is not entitled to a discharge. In support of this position, Plaintiff attached to the Complaint documents showing that Affordable Marine paid rent on Defendants' personal residence one month, and made several direct payments to Ms. Phillips.¹⁸ Plaintiff contends that the expense sharing between Defendants and Affordable Marine demonstrates that their bankruptcy is a business bankruptcy and therefore they do not qualify for a discharge under Chapter 7 as "individuals." Plaintiff's argument is legally and factually wrong.

No evidence or argument by Plaintiff shows Affordable Marine is anything other than a sole proprietorship owned and operated by Mr. Phillips. In fact, Plaintiff sued "Jeffrey Phillips d/b/a Affordable Marine Service" in state court, and that is the individual against whom the

¹⁸Plaintiff attached to the Summary Judgment Motion a document represented as a copy of Affordable Marine's transaction summary reflecting additional transactions with the name "PHILLIPS, CHRISTI" [Ms. Phillips] in February, March, and April. Doc. 32-5.

State Court Judgment was entered.¹⁹ An unincorporated business, like Affordable Marine, cannot be a debtor in bankruptcy because it is not a separate legal entity from its proprietor.²⁰ Here, the record clearly indicates that Defendants are individuals. Section 727(a)(1) is inapplicable, so Plaintiff is not entitled to summary judgment against either Defendant on Count I.

Plaintiff is not entitled to Summary judgment as to Count II, nondischargeability of debt under § 523(a)(6), because Plaintiff has failed to show willful and malicious injury.

Section 523(a)(6) excepts from discharge any debt “for willful and malicious injury by the debtor to another entity or to the property of another entity.”²¹ The party seeking a determination under this section bears the burden to demonstrate that the debtor committed an intentional act for the purpose of causing injury or with the knowledge that injury was substantially certain to result.²²

¹⁹ Doc. 32-1.

²⁰ 11 U.S.C. § 109(a); § 101(41) (2020). *In re Know Thy Self, Inc.*, No. 06-62628, 2006 WL 6589908, at *2-3 (Bankr. N.D. Ga. Mar. 17, 2006); *In re KRSM Properties, LLC*, 318 B.R. 712, 717 (B.A.P. 9th Cir. 2004).

²¹ 11 U.S.C. § 523(a)(6) (2020).

²² *In re Jennings*, 670 F.3d 1329, 1334 (11th Cir. 2012) (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 61–62 (1998)).

Plaintiff contends that the State Court Judgment is nondischargeable under 11 U.S.C. § 523(a)(6) because Plaintiff *believes* Mr. Phillips intentionally set fire to the Vessel.²³ The only support Plaintiff provides for this count is a copy of the State Court Judgment, which contains no findings of fact at all.²⁴ In fact, the State Court Judgment appears to contradict Plaintiff's claim that Mr. Phillips intentionally set fire to the Vessel: had the Vessel been destroyed, it seems illogical for the state court to have ordered Mr. Phillips to return the Vessel to Plaintiff.²⁵ Regardless, Plaintiff has submitted no evidence whatsoever that the Vessel was destroyed by fire, and certainly not that any such fire was deliberately set by Mr. Phillips.

Even if Plaintiff were ultimately able to prove willful and malicious injury by Mr. Phillips, as alleged in Count II, Plaintiff makes no such allegation against Defendant, Christina Lee Phillips. Plaintiff's Motion for Summary Judgment as to Count II must be

²³ Plaintiff claims that he delivered his boat to Mr. Phillips for repair and the boat was damaged by a fire. Plaintiff alleges "it is believed" that Mr. Phillips set the fire on purpose because of a dispute regarding a lack of progress on the repairs. Doc. 3, p. 3.

²⁴ The State Court Judgment states that Plaintiff "sustained the allegations of" certain counts of his complaint but says nothing about any of those counts. Doc. 32-1, p. 1.

²⁵ *Id.* at 2.

denied, with prejudice, as to Christina Lee Phillips and without prejudice as to Mr. Phillips.

Plaintiff has failed to establish that he is entitled to judgment as a matter of law on Count III, denial of discharge under § 727(a)(2).

Under § 727(a)(2) a debtor can be denied a discharge if the debtor,

with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-- (A) property of the debtor, within one year before the date of the filing of the petition; or (B) property of the estate, after the date of the filing of the petition.²⁶

A party objecting to a discharge bears the burden to demonstrate all elements of the statute.²⁷ Plaintiff has not met this burden.

In his Complaint, Plaintiff alleges various transactions and failures to disclose as grounds to deny both Defendants' discharges under § 727(a)(2): (1) a November 2018 rent payment by Affordable Marine for the Phillips' residence; (2) a series of payments by Affordable Marine to Ms. Phillips between February and April of 2019; (3) Mr. Phillips' nondisclosure and concealment of certain assets owned

²⁶ 11 U.S.C. § 727(a)(2) (2020).

²⁷ *In re Jennings*, 533 F.3d 1333, 1339 (11th Cir. 2008).

by Affordable Marine, including tools, inventory, computers and accounts receivable, and a trailer apparently purchased by Affordable Marine in August 2018 for \$500; (4) Mr. Phillips' failure to disclose income from E-bay sales and Uber; and (5) the transfer of a boat by Mr. Phillips to a close acquaintance for little or no value just prior to the bankruptcy.²⁸ Because Plaintiff's claim is solely against Mr. Phillips, arguably Plaintiff could present a case that Mr. Phillips caused Affordable Marine to pay money to Ms. Phillips to keep that money away from Plaintiff in the event of a garnishment or other post-judgment collection process.²⁹ Regardless, Plaintiff has failed to provide evidence to support summary judgment on his § 727(a)(2) claims.

The fact that Affordable Marine paid one month of the Phillips' rent does not prove that Defendants made a transfer with intent to hinder, delay or defraud creditors within the meaning of § 727(a)(2)(A). Because Affordable Marine was Mr. Phillips' sole proprietorship, its

²⁸ Doc. 3, pp. 4-8.

²⁹ Because the amounts transferred to Ms. Phillips are relatively small, Plaintiff might have a difficult time proving intent to hinder, delay or defraud based solely on these transfers.

payment of Defendants' rent was the equivalent of Mr. Phillips paying that rent. Even if this transaction were proof of a transfer within the meaning of § 727(a)(2)(A), Plaintiff presents no facts that demonstrate that Ms. Phillips had anything to do with making this rent payment.

In the Complaint Plaintiff avers that "Co-Debtor, Christi Phillips is receiving money from the Affordable Marine Services account."³⁰ In the Summary Judgment Motion Plaintiff argues that Affordable Marine's payments to Ms. Phillips support denial of both Defendants' discharges. But Plaintiff still bears the burden to show that these payments were made with actual intent to hinder, delay or defraud, and Plaintiff has not alleged or provided facts to this effect. The only "evidence" of such payments consists of copies of printouts showing transactions in the name of "PHILLIPS, CHRISTI." These printouts are inadmissible, unauthenticated hearsay.³¹ Even if Plaintiff were able to prove the transfers occurred and were made with requisite intent, Plaintiff has not alleged that Ms. Phillips participated in

³⁰ Doc. 3, p. 5.

³¹ Rule 801(c), Federal Rules of Evidence.

making these payments, so has demonstrated no basis for denial of her discharge on that basis.

As to Affordable Marine's purchase of a trailer for \$500 in August 2018, Plaintiff has offered no admissible evidence to prove this purchase and no argument or evidence to support a finding that this amount was in exchange for a trailer worth far less than the \$500 transferred.³² If the trailer was worth what Plaintiff paid for it or more, it would be difficult to conclude that the purchase of this trailer shows intent to hinder, delay or defraud.

Plaintiff alleges that Mr. Phillips failed to disclose or concealed certain assets, including, tools, inventory, computers and accounts receivable belonging to Affordable Marine. While those actions may certainly form the basis for a successful objection to discharge, here again, these allegations are wholly unsupported by admissible evidence as required by Fed. R. Civ. P. 56(c).³³

Finally, Plaintiff urges that Mr. Phillips fraudulently transferred a boat to a close acquaintance just before filing bankruptcy, and that

³² In support, Plaintiff provides a copy of a check from Affordable Marine made out to Jerome Werner dated August 29, 2018, for \$500 for a "boat trailer." Doc. 3-6.

³³ Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056.

Mr. Phillips still has full use and enjoyment of that boat. But the only support for this allegation is a reference to a separate adversary proceeding brought by the Chapter 7 Trustee to avoid the transfer.³⁴ The Court may take judicial notice of the record in that adversary proceeding,³⁵ but that docket does not provide evidentiary support of the actual transfer or intent.

As with the other counts, in Count III Plaintiff does not specifically allege or provide any evidence that Ms. Phillips made any transfers or failed to disclose assets. But it is possible Plaintiff could produce evidence that Ms. Phillips participated in the transfers by Affordable Marine, and that those transfers were made with the requisite intent required under 11 U.S.C. § 727(a)(2).

CONCLUSION

Plaintiff has failed to carry his burden to demonstrate that he is entitled to summary judgment as a matter of law as to any of the

³⁴ *Chancellor v. Evans*, Case No.: 20-03004-KKS.

³⁵ Fed. R. Evid. 201(b), made applicable by Fed. R. Bankr. P. 9017. *In re Narcisi*, 539 B.R. 385, 389 (Bankr. M.D. Fla. 2015), *aff'd*, 559 B.R. 233 (M.D. Fla. 2016), *aff'd*, 691 F. App'x 606 (11th Cir. 2017).

Counts of the Complaint. The Summary Judgment Motion is due to be denied.

For the reasons stated, it is ORDERED:

1. Plaintiff's *Motion for Summary Judgment on Issue of Non-Dischargeability* (Doc. 32) is DENIED, as follows:
 - a. Count I, with prejudice as to both Defendants for failure to state a viable cause of action;
 - b. Count II, without prejudice as to Defendant, Jeffrey Dale Phillips; with prejudice as to Defendant, Christina Lee Phillips, on the basis that she owes no debt to Plaintiff; and
 - c. Count III, without prejudice as to both Defendants.
2. The hearing scheduled for June 16, 2020 on the Summary Judgment Motion is CANCELED.

DONE AND ORDERED on June 12, 2020.



KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Attorney for Plaintiff is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of this Order.